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No. 94-1780

In The

Supreme Court of the United States

October Term, 1994

DALE GEHRING,

Petitioner,

v.

J. I. CASE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's principal issue is founded on a contention that this is a "mixed motives" case governed by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Petitioner did not present his case as a mixed motives case before the district court or the Court of Appeals but presented it as a pretext case. It is not a mixed motives case. Petitioner misreads *Price Waterhouse* and improperly attempts to transform his case into a mixed motives case to secure review.

Petitioner's second issue concerning *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993), though accurately stated, does not independently warrant review.

Respondent, Case Corporation, believes the questions presented are:

1. Has Petitioner waived the central basis for review?

2. In a pretext-based age discrimination case, where the jury is instructed that age must be "a determining" factor to an adverse employment decision, **must** the jury **also** be instructed that age need not have been "the sole" factor in order to find age discrimination?

3. **Must** the jury in a pretext-based age discrimination case be instructed under *St. Mary's Honor Center v. Hicks* that it can presumptively find discrimination if it finds the employer's stated reasons for its action are pretextual?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below are petitioner Dale P. Gehring, who is an adult resident of the State of Wisconsin, and respondent, J. I. Case, which is now known as Case Corporation.

Case Corporation is a publicly owned Delaware corporation, with no parent entity and with the following non-wholly owned, non-foreign subsidiaries or partnerships/joint ventures:

Megavolt L.P., a Delaware Limited Partnership
Consolidated Diesel Company, a North Carolina General Partnership
Hay & Forage Industries, a Kansas General Partnership
Case Equipment Loan Trust 1992-A, a Delaware Partnership
Case Equipment Loan Trust 1993-A, a Delaware Partnership
Case Equipment Loan Trust 1993-B, a Delaware Partnership
Case Equipment Loan Trust 1994-A, a Delaware Partnership.

The following publicly owned corporate stockholder owns more than 10 percent of the stock of Case Corporation:

Tenneco, Inc., a Delaware corporation (and its wholly owned subsidiaries).

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28 U.S.C. § 1254(1) 1

Case submits that the Petition for Writ of Certiorari should be denied as review by the Court is neither warranted nor required under its criteria for granting review.

OPINIONS BELOW

The Court of Appeals affirmed the district court's denial of Gehring's requests for two jury instructions – one supplanting the but-for causation instruction with a statement that age need not be the sole factor (the district court and Case never suggested that age must be the sole factor), and the other an inference instruction based on *St. Mary's Honor Center v. Hicks* – and affirmed the district court's reiteration when the jury returned with a question concerning "a determining factor" that the phrase means but-for Gehring's age, he would not have been discharged.

The Court of Appeals denied Gehring's requests for rehearing and rehearing *en banc*.

The Court of Appeals' opinion is reported at 43 F.3d 340 and is accurately reproduced (minor typographical errors excepted) in Gehring's Petition at A36-A52.

The district court's unpublished judgment and order denying Gehring's motion for a new trial are accurately reproduced in Gehring's Petition at A55-A58.

JURISDICTIONAL STATEMENT

The Court of Appeals' order denying rehearing and rehearing *en banc* was entered January 30, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Because of the underlying issues of waiver and whether this is a mixed motives case, a detailed statement of the facts and Gehring's claims presented below is necessary.

Gehring's Discharge and The Facts Below

Case is a world-wide construction and agriculture equipment manufacturer headquartered in Racine, Wisconsin, with a facility formerly located in Wausau, Wisconsin. Gehring was employed with Case at this facility from 1964 to June 1991, when his employment ended during a reduction in force (RIF).

The 1991 RIF was not an isolated RIF for Case. Case had undergone several RIF's world-wide since 1990, reducing its work force by nearly half (to 17,000 employees) in order to remain viable in the increasingly competitive world-wide construction and agriculture equipment manufacturing industry. As a result, in 1993 Case was profitable after posting a loss of over 1 billion dollars in 1991.

Gehring joined Case in 1964 as a cost clerk, with a high school education and a one-year business accounting technical degree. Gehring subsequently graduated through a number of positions – from cost clerk, to cost accountant "Sr.," to cost supervisor and, in 1988, back to cost accountant, the position he held until his employment ended in 1991.[1]

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[1] Gehring lost his supervisory position in 1988 during a RIF that year, which was one of five RIF's occurring at the Wausau facility between 1988 and 1992.

At Case, Gehring undertook no formal education. The informal training he undertook consisted mostly of in-house seminars; most occurred in the 1970's to mid-1980's and none occurred after 1989.

The trial record established that Gehring wanted to remain a supervisor, and at issue was Gehring's unwillingness or lack of interest in doing the day-to-day monotonous detailed work needed to be done in the accounting department – a factor which became decisive when the 1991 plant-wide RIF occurred.

Ray Watson, Case's Wausau Controller, was the preliminary decision-maker for the finance department reductions during the 1991 RIF. Gehring's supervisor before Watson, Jim Von Rueden (whom Gehring had once supervised but who later surpassed Gehring and became Gehring's supervisor) had noted Gehring's disinclination to do detailed or day-to-day work (versus supervisory work) both when Gehring was a cost supervisor under his management and after 1988, when Gehring returned to his former cost accountant position.

Watson was recruited from another corporation in 1989, where he was Controller, because he had an auditing background. In April 1989, Case's Wausau facility had received a substantially negative audit report from its then parent entity, Tenneco, Inc. Within six months of Watson's arrival, the Wausau facility received a vastly improved rating in an initial follow-up audit.

Watson raised the performance "chin bar" within the finance department. As a result, he was not liked by some of his staff; and to a degree this included Gehring. Gehring and one particular co-worker (on whom Gehring

relied at trial for the putative direct evidence of discrimination referenced in Gehring's Petition) were allies within the department.

As part of raising the chin bar, Watson reorganized the functions of the cost accountants in the finance department (there were three), one of whom was Gehring. Instead of each being a generalist on several accounting aspects of the three main Case Wausau product lines, each was given a specific function common to each product. Gehring was to focus on special feature requests for the three products and on special projects, a decision Watson made with input of Gehring's former supervisor, Von Rueden.[2]

In early 1990, some of the special feature work was performed manually; the remainder was computerized. By early 1991, all of this work was computerized; equally significant, special feature work as a whole had substantially declined, as Case's production as a whole had declined.

As stated, the pivotal issue at trial was Gehring's inability or unwillingness to do day-to-day detailed work of the accounting department. In April 1991, Gehring identified his major objectives for that year; four of the six were to coordinate or assist in (not do) the finance department work.

Two independent witnesses, Von Rueden and Will Wellman (the oldest member of the finance area **and**

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[2] Special feature work consisted of reviewing the pricing of non-standard product components and totalling the material and labor values factored into the pricing.

retained during the 1991 RIF), corroborated Gehring's proclivity:

> Von Rueden:
>
> Basically, Dale's strength has always been his supervisory skills. . . . [But as] far as the day-to-day type of activities, he's probably not as proficient as other people that we've had in that position. . . .
>
> [The] detail, that was . . . something that he generally was able to have the people that he worked with to help him out with. . . .

Case App. 9.

> Wellman:
>
> [From] my observations [over the years]. . . . I believe that Dale was more interested in having meetings and discussing things than the on-hand gritty work.

Case App. 9-10.

When plans for the 1991 RIF were announced, Wausau plant manager Gallagher first asked Watson to give up two positions from the finance department. Watson's choices did not include Gehring's position. They included a clerical position held by a 48-year-old employee, and an administrative position held by a 35-year-old employee.[3]

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[3] Watson identified the clerical position (accounts payable clerk) because the individual occupying it, though doing a good job in the position, told Watson before the RIF in unrelated conversations that he did not want to do anything else. Watson identified the administrative position (general accounting administrator) because the person occupying it had been hired

After reporting to the plant manager with his recommendations, Watson was then asked to identify a third finance department position for elimination. Upset over having to give up a third, Watson identified Gehring's position, one of three cost accounting positions.

Watson testified that he identified Gehring's position as the third (rather than one of the other two cost accounting positions), because of Gehring's disinclination to do the detailed work of cost accountancy:

> We come back that the focus or the task was how to get the job done and continue the contribution with less people. We had daily routine tasks, we had special projects.

Case App. 11.

Gehring had the "technical competence" to perform the work of the other cost accountant positions, but nonetheless:

> . . . there was a reluctance on Dale's part to do the daily routine boring work, as some people may refer to it.
>
> So although he provided a valuable service as a special project guy, could we get by without it? Would it hurt us less without the special projects as the day-to-day? It would hurt us less.

Case App. 11-12.

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to replace Wellman when Wellman chose to retire (Wellman had already advised the company of his personal plans to retire in 1993). Watson focused on how he was going to get the same job done with two less people.

Gehring asserted that he was more versatile than the two other costs accountants who were retained, and that he should have been compared to these other accountants (reiterated in Petition at 3). The issue was not Gehring's versatility but **the department's** functionality if different positions were lost instead of Gehring's.

Gehring's chief witness at trial corroborated Case's position, admitting that he asked Watson hours after learning of the RIF why Gehring's position had been chosen, and that Watson said Gehring "was an Accountant II . . . [something about his] [in]ability to do some detailed thing[s] . . . [and] that the necessity for his function had been diminished [due to the computerization of special features work.]" Case App. 12-14.[4]

Gehring did not introduce direct evidence of discrimination. He relied on a single, alleged, temporally unconnected statement by Watson that Gehring had "retired before his time," introduced through Gehring's co-worker and chief witness, who was shown to be biased. The district court noted at close of evidence motions that "there [isn't] a perfect correlation between saying someone retired before his time and age discrimination." Case

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[4] Two Accountant III's were retained, which were of a higher classification than the Accountant II position Gehring held.

Cross-classification seniority comparisons (e.g., comparing an Accountant II to an Accountant III) were not permitted under Case's lay-off selection guidelines. Final decision-maker Winkleman, Case's Corporate Human Resources Manager, approved the recommendation concerning Gehring's position without a cross-classification comparison for this reason and under the guidelines designed to assure objectivity.

App. 14. Another co-worker (and Gehring witness) bolstered Watson's credibility, stating that Watson was honest and fair and that he had no problems with Watson: "[You] grew to learn his needs and wants. And once you did that, [I] was comfortable . . . with him." Case App. 15.

Watson did not recall ever saying that Gehring had "retired before his time," though he acknowledged that he had made the statement generally at Case Wausau in raising performance standards to reverse the substantially negative audit. At trial, he candidly said he believed Gehring had "retired before his time," in the sense that Gehring had chosen not to continue to improve his technical skills or his contribution to the department, despite reviews that his skills were lacking, instead choosing to gravitate toward special projects and assisting others – a role akin to his former role as a supervisor.

By contrast, Watson viewed Wellman, the oldest member of the department (age 53 in 1991) **and** retained during the RIF, as having accepted the challenge to "raise the chin bar" (versus Gehring's resisting it).[5] Eldon Horton, age 46 in 1991, whose position Watson also retained,

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[5] As part of raising the chin bar, Watson accelerated month-end closing reports – from the fifth day of the month following closing to 9:00 a.m. of the second business day of the month. Wellman brought Wausau forward to a number two ranking Case-wide in its month-end closing.

Timely month-end closing required timely receipt of journal entries from the cost group, which Gehring *de facto* headed based on his years of service with Case. Wellman managed the accelerated month-end closing project as the formal head of general accounting. Out of apparent resentment over losing his supervisor position in 1988, Gehring resisted the accelerated time-table by having his group delay submitting its journal

chose to learn extensive PC technology and to apply it to Case Wausau. The record also established that five of the six other finance department employees retained during the 1991 RIF were in the protected class.

The Instructions Below

Detailed discussion of the instructions Gehring requested at trial appears in the relevant discussion sections of this brief. Gehring did not present mixed motives evidence as defined by *Price Waterhouse* but presented a standard pretext case and requested a standard pretext instruction. Case App. 1.

DISCUSSION

Gehring confuses this case by equating *Price Waterhouse's* adoption of a shifting burden in confined "mixed motives" cases with the Court's definition of the "but-for" causation standard applicable to all disparate treatment cases.[6] He presumes but never establishes that this is a "mixed motives" case within the meaning of *Price Waterhouse*.

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entries until precisely 9:00 a.m. of the second business day of each month-end cycle, even when the information was ready for transmittal earlier.

[6] *See* Petition at i ("The question presented is whether the standard of causation for a multiple motive case brought under the [ADEA] . . . require[s] a multiple motive instruction. . . . "); and at 3 ("Given that petitioner's discharge involved multiple motives, petitioner asked the District Court to instruct the jury that age did not have to be the sole factor in the discharge decision. . . . ").

Price Waterhouse did not change the causation requirement in disparate treatment cases. There is nothing aberrant about the Court of Appeals' opinion in this case, and review is not necessary despite Gehring's conflating *Price Waterhouse*.

We begin with the point that Gehring never raised below the *Price Waterhouse* issue he now raises in his petition, a threshold basis on which certiorari can and should be denied.

We follow with discussion that this is not a mixed motives case within the meaning of *Price Waterhouse*, and that the Court of Appeals' decision nevertheless comports with the causation standard in disparate treatment cases affirmed in *Price Waterhouse* and this Court's subsequent precedent.

I. PETITIONER NEVER RAISED HIS CENTRAL ISSUE REGARDING *PRICE WATERHOUSE v. HOPKINS* BEFORE THE DISTRICT COURT OR THE COURT OF APPEALS

Below, Gehring contended only that the district court erred in not supplanting the but-for instruction with the statement that age need not be the sole factor to an adverse employment decision. Case App. 2 (Gehring Court of Appeals brief at 12 & 13). The district court and Court of Appeals each concluded that the but-for causation standard for disparate treatment ADEA cases self-evidently implies that age need not be the sole factor, and that an additional supplanting statement is unnecessary.

That Gehring pressed his case as a pretext case is shown by the substantive instruction he actually sought at trial. Case App. 1. He requested a standard pretext instruction, not a *Price Waterhouse* burden-shifting, mixed motives instruction. It is also shown by his requested *St. Mary's Honor Center v. Hicks* instruction, Case App. 8, a **pretext** instruction, by which Gehring wished overtly to tell the jury that it could infer discrimination merely from its disbelief of (if it disbelieved) Case's explanation for eliminating Gehring's position. *See also* Petition at 30 ("This inference is the crux of [a ***McDonnell Douglas*** case].") (emphasis supplied).

Gehring twice cited *Price Waterhouse* to the Court of Appeals but only cryptically and for reasons unrelated to a claim that his was a mixed motives case.[7] Gehring also asserted that his case involved "two determining factors" because of **the RIF** and age ("but for the reduction in

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[7] *See* Case App. 3-6 (Gehring Court of Appeals brief at 18; abstractly referencing *Price Waterhouse* and asserting that "the phrase 'a determining factor' has anything but a clear meaning"; Reply at 8, citing *Price Waterhouse* for the tangential proposition that age need not have been the sole cause for Gehring to prevail; Case's brief at 37-38, n. 19, stating that the citation to *Price Waterhouse* is unclear and in any case inapposite [and noting that Gehring's citation to the Civil Rights Act of 1991 was inapt, since his claim arose before the Act's effective date and since the relevant portions of the ADEA were not altered by the Act; *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994) (non-retroactivity generally); *Armbruster v. Unisys Corp.*, 32 F.3d 768, 771 at n. 3 (3rd Cir. 1994) (as to ADEA cases); *Miller v. Cigna Corp.*, 47 F.3d 586, 598-99 at n. 10 (3rd Cir. 1995) (*en banc*) (substantive provisions of the Act did not amend the ADEA)]).

force [Gehring's] age wouldn't have made any difference."), *see* Case App. 15; but as discussed below, this is not what a *Price Waterhouse* "mixed motives" case is about.

For the reasons evident from the subsequent discussion of this brief, the Court of Appeals did not discuss *Price Waterhouse* in its opinion or treat the case as a *Price Waterhouse* mixed motives case.

Review by this Court is unmerited under its rules of waiver. Absent extraordinary circumstances – not present here – issues not raised before the district court or the Court of Appeals will not be considered as a basis for granting certiorari. *Illinois v. Gates*, 462 U.S. 218, 219-22 (1983) (new issue versus new argument on previously raised issue will not be considered); *see also Lebron v. National R.R. Passenger Corp.*, ___ U.S. ___, 115 S. Ct. 961, 965 (1995) (waiver rule; but considering new argument to support claim actually raised below).

II. THIS IS NOT A "MIXED MOTIVES" CASE

Price Waterhouse established a burden shifting mechanism for a limited number of cases where overt evidence of discriminatory animus exists. *Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring). The Court in *Price Waterhouse* did not alter the but-for causation standard[8]

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[8] *See Price Waterhouse*, 490 U.S. at 246, n. 11 ("[W]here an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that gender *did* make a difference to the outcome.") (plurality opinion) (emphasis original); *Id.* at 249 ("A court that finds for a plaintiff under this standard has effectively

but held that where the plaintiff presents sufficient evidence of discriminatory animus, the burden of persuasion shifts to the employer to show that it would have made the same decision absent the unlawful motive. 490 U.S. at 258 (plurality opinion); *Id.* at 260 (White, J., concurring); *Id.* at 261 (O'Connor, J., concurring); *Id.* at 291 ("risk of non-persuasion" [**disproving** but-for causation] shifts to the employer) (Kennedy, J., dissenting, with Renquist, C.J., and Scalia, J., joining).

Price Waterhouse cases unaffected by the Civil Rights Act of 1991 require "overt or [e]xplicit evidence of discrimination – *i.e.*, the 'smoking gun' . . . ," *Armbruster v. Unisys Corp.*, 32 F.3d 768, 782 (3rd Cir. 1994) (*quoting Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 523 (3rd Cir. 1992)). The evidence must be "so revealing of discriminatory animus that it is not necessary to rely on any presumption from the *prima facie* case to shift the burden of production." *Armbruster*, 32 F.3d at 778. The evidence must be direct and substantial enough to warrant shifting the burden to the employer to disprove that the illegitimate factor was not a but-for cause of the decision, i.e., that it would have made the same decision absent considering the illegitimate factor. *Id.*

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concluded that an illegitimate motive was a 'but-for' cause of the employment decision.") (plurality opinion) (citations omitted); *Id.* at 281 ("The theory of Title VII liability the plurality adopts . . . essentially incorporates the but-for standard.") (Kennedy, J., dissenting); *Id.* at 281 ("The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof.") (Kennedy, J., dissenting).

"Stray remarks" by non-decisionmakers, or "statements by decisionmakers unrelated to the decisional process itself," will not suffice. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). In only a very limited number of cases is *Price Waterhouse* relevant. *Id.* at 280 ("In sum, the Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases.") (Kennedy, J., dissenting).

The motive, in addition to age, which Gehring ascribed at trial was the RIF:

> There can be two determining factors. . . . For instance, in this case to use a real good example, but for the reduction in force his age wouldn't have made any difference. It had to be a combination of two determining factors. One, a reduction in force. The decision would not have happened without that. One, the fact that he was old and both are -- they are necessary for the equation. Both have to be there in order for there to be discrimination or he wouldn't have been terminated.

Case App. 15.

The district court correctly observed (the Court of Appeals implicitly agreed):

> We assume the reduction in force. All we . . . are trying to isolate out of this picture is assuming a reduction in force and a necessity to fire three people, what was it that made this person one of [the] three? So sure, of course, without a reduction in force none of us would be here in this courtroom arguing this case. So that isn't -- the determining factor in why Dale Gehring was

> picked as one of the three is in your view his age and in defendant's view something else.

Case App. 16.[9]

The coalescence of the RIF and Gehring's discharge did not create a *Price Waterhouse* mixed motives case. *See Starceski v. Westinghouse Electric Corp.*, ___ F.3d ___, 1995 WL 254804, at *4 (3rd Cir. May 3, 1995) (affirming the use of a *Price Waterhouse* mixed motives instruction in a RIF case, but basing its decision on plaintiff's supervisor's testimony that the second level manager responsible for the termination decision and for implementing the RIF

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[9] Gehring identified the RIF as a "multiple motive" in arguing to the district court that the jury should be told that age need not be the sole cause of his discharge – an argument principally made after the jury returned with a question about the meaning of the but-for causation phrase of age must be "a determining factor." This was an extension of his argument made during pretrial conference over whether the district court should use the phrase "**a** determining factor" in the special verdict and instructions (the formulation Gehring requested) or "**the** determining factor" (the formulation Case requested, since it is logically confusing to have more than one **determining** – or but-for – cause) – revisited at the instruction conference. The district court used Gehring's "**a** determining factor" formulation.

Gehring had briefly identified the RIF as the "mixed motive" during the instruction conference. (See Petition at A66.) In response to the district court's observation quoted in text (the proceedings following the jury's question), Gehring then suggested that his type of job was a mixed motive: "Age has to be a factor that tips the scale. It has to be a but for factor. [But] [e]ven taking this reduction in force, they could say, Well, [sic] it was age plus the type of job he had. . . . If he was a younger man . . . in that particular job, he wouldn't have been the one selected. . . . " Case App. 16. None of this creates a true mixed motives case.

told the supervisor and other second level supervisors "to consider age in the assignment of work" and "to transfer work from older to younger employees," and told him in relation to the plaintiff "to 'doctor' [plaintiff's] performance appraisals so that they would reflect poor performance"). *Starceski* rejected a general rule that all successfully prosecuted age discrimination cases involving a RIF will involve mixed motives "because the plaintiff would be alleging the employer had both a legitimate reason (the economic need to reduce the workforce) and an illegitimate reason (to terminate an employee based on his or her age)"; such a rule would incorrectly force every RIF case into a *Price Waterhouse* framework. *Starceski*, 1995 WL 254804, at *5 (citation omitted). Rather:

> . . . the distinction between a *Price Waterhouse* and a *McDonnell Douglas/Burdine* case lies in the kind of proof the employee produces on the issue of bias. In the former, direct evidence of discriminatory animus leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it.

Id. at *5.

On certiorari, Gehring now relies on the alleged stray remark of preliminary decision-maker Watson as "mixed motives" evidence, *see* Petition at 3. This, still, does not suffice.

Price Waterhouse left *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) intact. *Price Waterhouse*, 490 U.S. at 245 ("Our holding casts no shadow on *Burdine*. . . . ")

(plurality opinion); *Id.* at 261 ("The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established in our unanimous [decision in *Burdine*]. . . . ") (O'Connor, J., concurring). Thus, both before **and after** *Price Waterhouse*, a plaintiff in a disparate treatment case can proceed by offering direct evidence of discrimination, or indirectly by offering proof of pretext. ("Our opinions make plain that *Burdine* applies to all individual disparate-treatment cases, whether the plaintiff offers direct proof that discrimination motivated the employer's actions or chooses the indirect method of showing that the employer's proffered justification is false, that is to say, a pretext.") *Price Waterhouse*, 490 U.S. at 288 (Kennedy, J., dissenting) (quoting *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 at n. 3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.")). Gehring explicitly followed the *Burdine* methodology at trial, arguing to the jury that he presented both circumstantial and direct evidence (the alleged stray remark) of discrimination. Case App. 16-18.

Not every disparate treatment case is a mixed motives case. *Price Waterhouse* (self-evidently); *see also Miller v. Cigna Corp.*, 47 F.3d at 597, n. 9 (In most ADEA cases reaching the jury, the record will support an inference that both a legitimate and illegitimate reason played a role in the employer's decision, but these cases differ from true *Price Waterhouse* mixed motives cases, where "not only [does] the record [support] a conclusion that both legitimate and illegitimate factors played a role in the employer's decision, but . . . the plaintiff's evidence

of discrimination is sufficiently 'direct' to shift the burden of proof to the employer on the issue of whether the same decision would have been made in the absence of the discriminatory animus.").

Gehring's proffered evidence, qualitatively, does not meet *Price Waterhouse's* test. Mixed motives evidence must be clear and substantial; moreover, remarks by a decision-maker must be linked, temporally and factually, to the decision at issue. *Armbruster*, 32 F.3d at 779, n. 15 (alleged statement by division president (and apparent ultimate decision-maker) two years prior to the decision at issue that "I don't want any over 50 burnouts promoted" is too temporally distant and not linked to decision at issue); *Hook v Ernst & Young*, 28 F.3d 366, 375 (3rd Cir. 1994) (finding sexual comments by plaintiff's supervisor insufficient for a mixed motives charge because they had nothing to do with plaintiff's job performance and were unrelated to the adverse decision process challenged in the case); *cf. Hazen Paper Co. v. Biggens*, ___ U.S. ___, 113 S. Ct. 1701, 1706 (1993) (age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome" of that process). The alleged stray remark on which Gehring relied was never connected to the decision at issue; and, as the district court observed in close of evidence motions, it does not necessarily correlate with age discrimination, even if made. Case App. 14. (Younger and older employees can become lazy.)

Gehring's is not a mixed motives case and was not presented as one. At trial, his position was that the RIF was a dual motive for his discharge, and that the alleged stray remark of Watson was ***Burdine*** direct evidence. He

first implies that the latter is *Price Waterhouse* "mixed motives" evidence on certiorari, but the claimed remark does not even marginally meet *Price Waterhouse's* test.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH *PRICE WATERHOUSE* AND THE COURT'S SUBSEQUENT DECISIONS IN *HAZEN PAPER CO. v. BIGGENS* AND *ST. MARY'S HONOR CENTER v. HICKS*

Gehring's ultimate argument is that in any ADEA case where more than one motive is at play, a but-for causation instruction that does not also tell the jury that age need not be the sole factor is flawed under *Price Waterhouse* and *Hazen Paper*. *See* Petition at 9 & 15 (the district court and the Court of Appeals erred in imposing a but-for standard of causation where "multiple motives [are] at play") (*Hazen Paper* cited at 15). As stated, at trial, the "multiple motives" were the RIF and age; Gehring now recasts them as age and some legitimate factor.

Gehring misses the point, because *Price Waterhouse* had nothing to do with other than a very limited number of true, mixed motives cases.[10] Discrimination cases

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[10] Gehring's related argument that the district court's "business judgment" instruction effectively told the jury that it must override a finding of age discrimination "if Case produced a legitimate reason for the termination," and guaranteed a verdict for Case, Petition at 17, misstates the instruction and is senseless.

The business judgment instruction is reproduced at Case App. 7. The district court gave this instruction to focus the jury on whether Case engaged in age discrimination, not whether it would have made the same decision as an employer.

inherently involve multiple motives: the motive the employee asserts, and the motive the employer asserts. *Miller v. Cigna Corp*, 47 F.3d 586, 597 at n. 9 (3rd Cir. 1995). Some merit to the employee's claim must exist for the case to reach the jury. *Id.* The jury's goal is to isolate the effect, if any, of the claimed improper motive, i.e., age.[11]

It followed the main instruction, which told the jury that it was to decide "whether plaintiff has shown by the greater weight of the credible evidence that he would not have been let go had it not been for his age." (Quoted in *Gehring* opinion below at Petition A43.) It told the jury that in deciding **this question,** it must ignore their opinions, if any, on "whether [Case] exercised good business judgment in eliminating [Gehring's] position" and instead focus on whether Case had a legitimate, non-discriminatory reason for its action or acted because of Gehring's age (as the district court told the jury in the immediately preceding principal instruction). The question of whether the jury **agreed with** Case's reason is distinct from whether intentional discrimination was the reason for Case's decision. *See St. Mary's*, 113 S. Ct. at 2752.

[11] Gehring asserts that the jury's question about the meaning of "a determining factor" shows that it believed age was a factor in Case's decision, *see* Petition at 5; but his conclusion does not necessarily follow from the question.

Equally, the jury may have viewed **the RIF** as a determinative factor to Gehring's discharge (exactly what Gehring argued to the district court), and wondered how or if there can be more than one "determining factor" – or but-for cause. The jury, which was well-educated, may have simply wanted a precise understanding of the term before it applied the facts. Or, maybe the jury thought Gehring had a bad attitude (which, to an extent, he did).

The important point is that the response – that age must be a but-for cause of the decision – given by the district court and adopted by the Court of Appeals properly responded to the inquiry, regardless of the context of the jury's question.

The Court of Appeals' analysis is consistent with this Court's analysis in *Hazen Paper*, *St. Mary's* and *Price Waterhouse*.

In *Hazen Paper*, the Court addressed the relationship between the standard of ordinary liability under the ADEA and the standard of liability for liquidated damages under the ADEA's provision for willful violations. In reviewing the case law governing disparate treatment cases, the Court reiterated that the ADEA's standard for ordinary liability is but-for causation. *Hazen Paper*, 113 S. Ct. at 1706 ("Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.").

In *St. Mary's*, the Court addressed a Title VII case in which multiple motives were at play, which it characterized as a **pretext** case, not a *Price Waterhouse* case. The possible reasons for the plaintiff's demotion and discharge were: race (plaintiff's claim); threats and violations of the employer's rules (employer's stated reasons); and personal animosity toward the plaintiff (what the district court, as the trier of fact, found probably motivated the adverse decision). *St. Mary's*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991); *see also* 113 S. Ct. at 2748.

The Court affirmed the district court's judgment in favor of the employer, holding that pretext does ***not*** automatically equate to discrimination. Rather, the plaintiff in a disparate treatment case – even one involving multiple motives – retains the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of

intentional discrimination," i.e., that discrimination was the true reason for the employment decision. *St. Mary's*, 113 S. Ct. at 2747-48. *See also Armbruster*, 32 F.3d at 783 ("After *St. Mary's* . . . the trier of fact cannot find for the plaintiff merely because it disbelieves the defendant's proffered explanation; it must **also** be persuaded that the employment decision was the result of the bias that can be inferred from the falsity of the defendant's explanation.") (emphasis supplied).

Hazen Paper and *St. Mary's* make clear that even in multiple motives disparate treatment cases (what most disparate treatment cases are about), but-for causation remains the pivotal consideration; and that true *Price Waterhouse* cases are cases not only where the record supports a conclusion that both legitimate and illegitimate factors played a role in the employer's decision, "but where the plaintiff's evidence of discrimination is sufficiently 'direct' to shift the burden of proof to the employer on the issue of whether the same decision would have been made in the absence of the discriminatory animus." *Miller*, 47 F.3d at 597, n. 9; *Id.* at 606 (concurring opinion).[12]

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[12] The hypothetical illustration of the Third Circuit in *Miller*, based on *St. Mary's*, is precisely what the *Gehring* Court of Appeals illustrated. In a pretext case, the fact finder may conclude that the alleged discrimination (e.g., age) and the employer's non-discriminatory explanation (e.g., absenteeism) both played a role in the employer's decision. It must then isolate the effect of the factor of age. It may find "that the plaintiff's absenteeism record played a part, but that the plaintiff would not have been fired if he or she were twenty years younger" – and thus find discrimination. *Miller*, 47 F.3d at 597. Or, it may find the converse true, i.e., that the same result would

Although Gehring says a court must explicitly instruct a jury that age need not be the sole factor to the employer's decision (even assuming a non-*Price Waterhouse* multiple motives case[13]), in addition to instructing it that it must be a but-for consideration to the decision, there is nothing about the Court's decisions in *Hazen Paper* or *St. Mary's* that supports this position. A jury need not duplicitously be told both what the employee must prove and, inversely, what the employee need not prove, **to prove** intentional discrimination.

This case does not present unique issues. The district court's and the Court of Appeals' formulations both fully embrace this Court's but-for causation standard of "actually played a role" and had "a determinative influence" on the decision, *Hazen Paper*, 113 S. Ct. at 1706; and to prove "intentional discrimination," *St. Mary's*, 113 S. Ct. at 2748. *Gehring* opinion below; Petition at A48-A49 (A determining factor means the plaintiff must prove he "would not have been let go [but-] for his age" – "had [he

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have occurred **even if** the employee were twenty years or younger – and thus find no discrimination. *Compare Gehring* opinion below; Petition at A49-50 (Our proposed instruction "tells the jury what to do if it finds that the employer took more than one thing into account;" [and the court's hypothetical constructs based on interplay of four possible variables]).

[13] Gehring's position fails even if his were a true *Price Waterhouse* mixed motives case, as the ingredient he claims is missing here – an explicit statement that age need not be the sole factor – is not what makes a proper *Price Waterhouse* mixed motives instruction. *See Miller*, 47 F.3d at 597, n. 9; *Armbruster*, 32 F.3d at 777-78 (discussing components of a true *Price Waterhouse* mixed motives instruction).

or she] been younger than 40 and everything else had remained the same."); *see also Miller*, 47 F.3d at 595, 597.

IV. THE COURTS OF APPEALS ARE NOT IN CONFLICT

The Courts of Appeals are not in conflict over the proper standard for but-for causation in ADEA cases. They have adopted different formulations to embrace the same concept. Some have interchanged the causation terms "but-for" and "a determining factor," (*Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Spagnuolo v. Whirlpool Corp*, 641 F.2d 1109, 1112 (4th Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F. 2d 974, 984 (9th Cir. 1981)) (Petition at 20); others use the more lay terms of "made a difference," what the Court of Appeals suggested here. *Smithers v. Bailar*, 629 F.2d 892, 897 (3rd Cir. 1980) (and other authorities cited in Petition at 21).[14]

These variations are no different from phrases the Court uses to convey but-for causation.[15] This Court need

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[14] The court in *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393-94 (8th Cir. 1992), *vacated*, ___ U.S. ___, 114 S. Ct. 42 (1993) (for reconsideration of issue of willfulness in light of *Hazen Paper*) (*on remand*, 12 F.3d 845 (8th Cir. 1994)), did not recently "develop yet another standard," as Gehring suggests. Petition at 21. In reviewing an instruction using the phrase "motivating factor," the *Glover* court merely suggested that the jury be told to focus on whether the same decision would have been made regardless of the plaintiff's age. *See Gehring* opinion below; Petition at A51.

[15] *See Price Waterhouse*, 490 U.S. at 258 ("motivating" factor) (plurality opinion); *Id.* at 259 ("substantial factor") (White, J., concurring); *Id.* at 276 ("made a difference") (O'Connor, J.,

not undertake review merely to give micro-phraseology that may not work for every case. *Cf. Gehring* opinion below ("We do not want to tie the judge's hands; language works best if it responds to the nature of the precise dispute between the parties."). Petition at A51.

Gehring inaccurately states that all circuits addressing the issue have held that an ADEA jury **must explicitly** be told that age need not be the sole factor to the adverse decision. Petition at 22. Courts making this statement have done so in the context of otherwise inaccurate instructions, and required the additional statement **to correct the inaccuracy**; *see Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 & n. 6 (6th Cir. 1975) (district court did not instruct jury on "but-for" test but simply told jury to focus on whether the plaintiff "was discharged from his job because of his age"); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1316 (9th Cir. 1992) (district court "completely failed to give any guidance as to the meaning of 'determining factor' "); or they have done so in passing comment, *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2nd Cir. 1983) (defendant's challenge that the district court did not meaningfully guide the jury on the concept of a "determinative factor" is unmerited, since the district court explained that age at all events must be a "but-for" factor) (all cited in Petition at 22-23 and (by Gehring) to the Court of Appeals). The *Gehring* district court **twice** explained to the jury that age must be a but-for factor. Petition at A43, A44, A49.

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concurring); *Hazen Paper*, 113 S. Ct. at 1706 ("actually played a role . . . and had a determinative influence"); *Id.* at 1710 (was "a determinative factor"); *St. Mary's*, 113 S. Ct. at 2752 ("was the real reason").

Gehring's comparison of *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547 (7th Cir. 1982) and *Mayall v. Peabody Coal Co.*, 7 F.3d 570 (7th Cir. 1993), to the *Gehring* opinion is equally inaccurate. *See* Petition at 23-24.

In *Golomb*, the court reiterated that the salient points of a proper ADEA instruction are that age be "a determining" factor, and that this means "but-for" causation; and then suggested that district courts **may** also want to state that age need not be "the sole determining factor." *Golomb*, 688 F.2d at 552, n. 2. In *Mayall*, the court found that "[t]he phrase 'a determining factor' ha[d] [a] clear meaning **in the otherwise proper instructions**." *Mayall*, 7 F.3d at 574 (which incorporated "but-for" standard (as an affirmative defense)) (emphasis supplied); *Id.* at 573, n. 3 (if defendant has proved age was not a but-for consideration, the verdict should be for the defendant). The *Gehring* Court of Appeals merely suggested further simplification, since coupling the phrase "determining factor" with "but-for" causation makes use of the phrase "determining factor" unnecessary. *See* Petition at A49 ("**In these instructions** 'determining factor' carried no weight.") (emphasis supplied).

Review is not necessary, because there is no conflict among the Courts of Appeals.

V. *ST. MARY'S HONOR CENTER v. HICKS* DOES NOT REQUIRE CLARIFICATION

Gehring's last basis for review is substantially without merit. The Court of Appeals correctly ruled that a jury need not be instructed on permissible inferences, much

less full presumptions governing disparate treatment cases. *See* Petition at A41-42, citing *United States v. Sblendorio*, 830 F.2d 1382 (7th Cir. 1987) (addressing issue in the context of Gehring's other request for a *McDonnell Douglas* paradigm instruction, rejected under the dearth of authority deciding that one should not be given).

The reasoning why a paradigm instruction should not be given holds true for *St. Mary's* **permissive** inference based on a finding of pretext. *See St. Mary's*, 113 S. Ct. at 2749. It is simply another inference arising from the shifting burdens of production in disparate treatment cases.[16]

Gehring seizes on the Court's statement in *St. Mary's* that clarity regarding the requisite elements of proof is important. Petition at 28-29.

This statement (which the Court made in closing to respond to the respondent's argument that the Court's

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[16] Gehring's *St. Mary's* instruction is produced at Case App. 8, and was not fairly worded or accurate. It did not adequately embrace *St. Mary's* critical basis that the jury must find **both** pretext and that discrimination was the real reason for the employment decision. *St. Mary's*, 113 S. Ct. at 2747-48 and at 2749, n. 4; *Armbruster*, 32 F.3d at 783.

The district court did not use a *St. Mary's* instruction as to do so would have imbalanced the district court's dispositive single instruction (quoted in Petition at A43) and would inevitably have led to a paradigm instruction, once the process of adding various pieces on shifting burdens and presumptions started. *See* Case App. 18-19.

Instead, the district court permitted Gehring to argue, as he would regardless of *St. Mary's*, and as he did argue, a *St. Mary's* permissible inference. *See Gehring* opinion below; Petition at A42.

decision was ill-advised, given the right to a jury trial in Title VII cases created by the Civil Rights Act of 1991, *St. Mary's*, 113 S. Ct. at 2756), relates to clarity in the **elements of proof**. The element of proof established by *St. Mary's* is that *"there must be a finding of discrimination."* *Id.* at 2742 n. 4 (emphasis original); (" '[T]he ultimate question [is] discrimination, *vel non*.' "); *Id.* at 2753 (citations omitted).

Thus, *St. Mary's* established as **an element of proof** that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason," *Id.* at 2752 (emphasis original) – quite different from what Gehring wanted the district court explicitly to tell the jury.

Gehring's construction of *St. Mary's* is wrong. The import of *St. Mary's* is to focus the jury not on a permissive inference but on whether **all of the evidence**, in combination, "suffice[s] to show intentional discrimination." *Id.* at 2749.

The Court of Appeals' decision comports with *St. Mary's*. It does not force juries "to guess as to the type of evidence [that is] required to prove [intentional] discrimination," Petition at 31. *St. Mary's* is clear.

CONCLUSION

Respondent J.I. Case (Case Corporation) respectfully requests that the Petition for Writ of Certiorari be denied. The Petition presents no novel issues, conflicts among the circuits, or other justification for further review; and the lower courts' rulings are not in error.

Respectfully submitted: June 7, 1995.

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CASE'S SUPPLEMENTAL APPENDIX

Gehring Substantive (Pretext) Instruction
..... Case App. 1

Gehring Court of Appeals Initial Brief (Excerpt)
..... Case App. 2

Gehring Court of Appeals Reply Brief (Excerpt)
..... Case App. 4

Case Court of Appeals Response Brief (Excerpt)
..... Case App. 5

District Court "Business Judgment" Instruction
..... Case App. 7

Gehring *"St. Mary's"* Instruction
..... Case App. 8

Trial Transcript Excerpts (Quoted Passages)
..... Case App. 9

GEHRING SUBSTANTIVE (PRETEXT) INSTRUCTION

* * *

If plaintiff has proven [a *McDonnell Douglas prima facie* case], he has proven enough so that you may, but you need not, render a verdict in his favor. If the plaintiff has failed to prove one or more of [the *McDonnell Douglas prima facie* case elements], you must find for the defendant.

If you find that plaintiff has proven these facts and that the defendant has not produced a reason other than age for the discharge, then you must find for the plaintiff.

If, on the other hand, defendant has produced evidence of a reason other than age for discharging plaintiff, you must find for the defendant unless you find, considering all the evidence in the case, that plaintiff has proved that the reason given by the defendant was not the true reason for plaintiff's discharge, or that the plaintiff's age more likely than not was a determining factor in his discharge.

[R. 48:5-6]

GEHRING COURT OF APPEALS INITIAL BRIEF (EXCERPT)

* * *

[p. 12] **ARGUMENT**

I. The District Court Erred In Refusing To Instruct The Jury That Age Did Not Have To Be The Only Factor Motivating The Defendant To Terminate Gehring's Employment

In an age discrimination case, the court should be sure to instruct the jury on the two factors critical to the jury's understanding of the phrase "a determining factor:" First, that there can be more than one determinative factor in the employer's decision and, second, that age must be a factor in the absence of which the plaintiff would not have been discharged. *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76 (2nd Cir. 1983). The importance of instructing the jury in this manner was emphasized in *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975) where the Sixth Circuit explained: . . . .

* * *

[p. 13] In instructing the jury in this case, the District Court failed to protect against the mistaken inference that age had to be the sole factor in Gehring's discharge. While the court instructed the jury that age had to be a but for cause of Gehring's discharge, the court completely failed to advise the jury that age did not have to be the sole factor in the discharge. This incomplete instruction . . . was worse than no instruction at all.

* * *

[p. 18] [T]he court nonetheless responded to the jury's question with an instruction that. . . . This was tantamount to instructing the jury that the phrase "a determining factor" really meant the sole factor.

Third, the development of Title VII case law shows that the phrase "a determining factor" has anything but a clear meaning. To the contrary, the meaning of this phrase has generated endless confusion and dissension among the courts. The United States Supreme Court itself noted that this very issue had "to say the least, left the circuits in disarray." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 n.2, 109 S.Ct. 1775 (1989). The Supreme Court, moreover, after noting this disarray and issuing what purported to be the final word on this issue, was itself overruled by Congress' enactment of the Civil Rights Act of 1991. . . .

* * *

GEHRING COURT OF APPEALS REPLY BRIEF (EXCERPT)

[p. 8] [T]he court's "but for" instruction . . . was not only initially given to the jury but was erroneously and prejudicially repeated a second time in response to the jury's question.

The concept that age must be a but for cause of the discharge decision is analytically distinct from the concept that age does not have to be the sole cause in order for the plaintiff to prevail. As Chief Justice [sic] Kennedy noted in a Title VII case:

> We are told . . . that but for cause is not required, since the words "because of" do not mean "solely because of" . . . *No one contends, however, that . . . sex must be the sole cause of the decision before there is a Title VII violation. This is a separate question from whether consideration of . . . sex must be a cause of the decision.* Under the accepted approach to causation that I have discussed . . . sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, i.e., a but for cause.

Price Waterhouse v. Hopkins, 490 U.S. 228, 284 (1989).

While the defendant erroneously argued. . . .

* * *

CASE COURT OF APPEALS RESPONSE BRIEF (EXCERPT)

[p. 37] There is no need to overrule *Mayall*. The court need only consider Gehring's own argument on page 15 of his brief, which is entirely circular in logic:

> While the district court's use of the phrase "a determining factor" in the jury instructions and special verdict **told the jury that other factors could also enter into the discharge decision** – the court's further instruction that age had to be a but for cause of the discharge told the jury just the opposite.

(Emphasis supplied.)

The court did not have to tell the jury that there can be more than one factor, but it must be a determining factor . . . but, then again, there can be more than one factor; but it must be a determining factor, *ad infinitum*. The court accurately conveyed to the jury, as Gehring concedes, that there can be more than one factor – but age must be a determining or "but for" factor. What Gehring complains of are at best amplifications of the correct statement of the law the court gave; but "once the court [correctly states] the law it [is] not error to refuse . . . more icing on the cake." *Lee v. Rapid City Area School Dist. No. 51-4*, 981 F.2d 316, 331 (8th Cir. 1992) (en banc) (original panel decision) (claim in ADEA case that instructions "did not sufficiently expound on all the ramifications of plaintiff's burden of proving that he would not have been discharged but for his age.").[19]

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[19] Gehring's arguments about *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and the Civil Rights Act of 1991 (addressing

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Price Waterhouse), *see* Gehring brief at 18 [this Appendix at 3], are difficult to follow, but neither has application here. *Price Waterhouse* was a true mixed [p. 38] motive case, i.e., where illegitimate considerations (gender) conclusively played a part in the decisional process, but the employer asserted that for legitimate reasons its ultimate decision would have been the same. This is not the case here.

Gehring argued that his was a mixed motive case, requiring undue focus on multiple factors in instructing the jury, because:

> There can be two determining factors . . . For instance, in this case to use a real good example, but for the reduction in force his age wouldn't have made any difference. It had to be a combination of two determining factors. One, a reduction in force. The decision would not have happened without that. One, the fact that he was old and both are -- they are necessary for the equation. Both have to be there in order for there to be discrimination or he wouldn't have been terminated.

R. 91: 71, lines, 16-24.

The trial court correctly observed:

> We assume the reduction in force. All we are trying to isolate out of this picture is assuming a reduction in force and a necessity to fire three people, what was it that made this person one of the three? So sure, of course, without a reduction in force none of us would be here in this courtroom arguing this case. So that isn't -- the determining factor in why Dale Gehring was picked as one of the three is in your view his age and in defendant's view something else.

R. 91: 71, line 25; 72, lines 1-9; *see also* R. 88: 149, lines 20-25; 150-153, line 23 (similar colloquy).

DISTRICT COURT "BUSINESS JUDGMENT" INSTRUCTION

In determining whether plaintiff has proven that defendant intended to discriminate against plaintiff because of his age, I instruct you that the question is not whether defendant exercised good business judgment in eliminating plaintiff's position, or whether you agree or disagree with defendant's reason. Defendant was allowed to take its action so long as defendant had a legitimate, non-discriminatory reason.

[R. 76:11]

GEHRING *"ST. MARY'S"* INSTRUCTION

MS. KENNELLY: I do have one that I would like to propose that's based on the *Hicks* decision. It's taken almost verbatim from the Opinion on Page 8.

If you find that the reasons given by the defendant for selecting plaintiff for termination were not the true reasons, you may infer the defendants intended to discriminate against the plaintiff. However, while a discriminatory motive may be inferred from this fact alone, you are not compelled to draw this inference.

* * *

[R. 88:142, Lines 1-9 (Tr. 3-A-142)]

VON RUEDEN – DIRECT

* * *

A Basically Dale's strength has always been his supervisory skills. He's very good at organizing, that type of thing.

As far as the day-to-day type of activities, he's probably not as proficient as other people that we've had in that position. . . .

As far as the detail, that was never really one of his strengths. That's something that he generally was able to have the people that he worked with to help him out with some of that stuff.

* * *

[R. 89:103, Lines 16-20 (Tr. 2-B-103); R. 89:104, Lines 9-12 (Tr. 2-B-104)]

WELLMAN – REDIRECT

* * *

Q Mr. Wellman, based upon your years at the facility and working with Mr. Gehring, do you have your or a view as to whether Mr. Gehring was good or interested in doing detailed work?

MR. FOX: Object to that as beyond the scope of cross.

THE COURT: Overruled.

THE WITNESS: I believe that Dale or my observations and a number of my people --

THE COURT: No, don't. Just on your own, on our own observations.

THE WITNESS: Okay, excuse me. Excuse me, Your Honor. I believe that Dale was more interested in having meetings and discussing things than the on-hand gritty work.

MR. SHINDELL:

Q Did you finish your answer?

A This is from basically observations, that they would go into meetings and spend several hours at least once a week in discussing -- and they would call it a departmental meeting. And they would go in and discuss different things.

* * *

[R. 88:130, Lines 18-25 (Tr. 3-A-130); R. 88:131, Lines 1-11 (Tr. 3-A-131)]

WATSON – DIRECT

* * *

A We come back that the focus or the task was how to get the job done and continue the contribution with less people. We had daily routine tasks, we had special projects.

* * *

[R. 88:57, Lines 7-9 (Tr. 3-A-57)]

WATSON – DIRECT

* * *

Q Did Mr. Gehring have in your judgment the technical competence to perform Mr. Gesicki's or Mr. Matuszewski's positions in June 1991?

A Yes, he did [but]. . . .

In my sense of observation, although there was a technical competence, there was a reluctance on Dale's part to do the daily routine boring work, as some people may refer to it.

So although he provided a valuable service as a special project guy, could we get by without it? Would it

hurt us less without the special projects as the day-to-day? It would hurt us less.

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[R. 88:56, Line 25 (Tr. 3-A-56); R. 88:57, Lines 1-3; 10-16 (Tr. 3-A-57)]

GESICKI – CROSS

* * *

Q Isn't it correct that within a couple of days of Mr. Gehring's position being eliminated, you spoke with Mr. Watson about why he made the selection he did in Mr. Gehring's case?

A It was within a couple of hours after Gehring was eliminated.

Q In fact, you expressed -- I don't know that you physically barged into Mr. Watson's office. But in essence you came to Mr. Watson immediately and expressed your sentiments about the decision.

A That's correct.

Q And isn't it a fact that Mr. Watson gave you an explanation for his decision? And among other things, he indicated that Mr. Watson -- Mr. Gehring, rather, was an Accountant II. He said that to you?

A He did say he was an Accountant II, yes.

Q And Mr. Watson said that there was some issue concerning Mr. Gehring's ability to do some detailed

thing concerning converting Brazilian currency into U.S. currency?

A He stated some fact like that, yeah, that he kept --

Q Just answer my question, sir.

A Yes.

MS. KENNELLY: Let the witness -- could you please let the witness finish his answer?

THE COURT: It's cross-examination, and the cross-examiner can cut him off if he thinks he's answering more than the question asked for.

MR. SHINDELL:

Q And isn't it a fact that Mr. Watson also said as the third basis or explanation that he gave you at the time is that Mr. Gehring's function or the necessity for his function had been diminished to a large extent because of the conversion to the CMS computer program? He also told you that.

A It was not a CMS computer program, it was a special program that Dale Gehring and the computer people had designed to do some costing that had been misunderstood evidently by Mr. Watson.

Q In any event, within a couple of minutes or within an hour of the decision being made or your learning of it, this is what Mr. Watson told you as the explanation for his --

A Yes.

* * *

[R. 90:97, Lines 10-25 (Tr. 1-B-97); R. 90:98, Lines 1-24 (Tr. 1-B-98)]

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We submit the case for directed verdict, Your Honor.

THE COURT: Thank you. I share some of the opinion that you expressed last, and that is that I have trouble or I don't think there is a perfect correlation between saying someone retired before his time and age discrimination.

I think you are perfectly right that there are people that start out at Age [sic] 25 with no zest for their job and doing the least that can be expected of them, not asking for extra work. It certainly could be said they have retired before their time.

But what I'm interested in finding out from you, Mr. Fox, in particular, is whether you have anything besides this one remark. . . .

* * *

[R. 87:59, Lines 15-25 (Tr. 2-A-59)]

MATUSZEWSKI - CROSS

* * *

Q And do you remember saying to the effect: No problems. Grew to learn [Watson's] needs and wants. And once you did that, you were comfortable working with him, meaning Ray Watson.

A Yes.

Q And do you remember saying that he was honest and fair?

A Yeah.

* * *

[R. 90:111, Lines 14-19 (Tr. 1-B-111)]

PROCEEDINGS FOLLOWING JURY QUESTION

* * *

[Mr. Fox:] There can be two determining factors even without a compliance. For instance, in this case to use a real good example, but for the reduction in force his age wouldn't have made any difference. It had to be a combination of two determining factors. One, a reduction in force. The decision would not have happened without that. One, the fact he was old and both are -- they are necessary for the equation. Both have to be there in order for there to be discrimination or he wouldn't have been terminated. . . .

THE COURT: . . . [W]e assume the reduction in force. All we are looking at and what we are trying to isolate out of this picture is assuming a reduction in force and a necessity to fire three people, what was it that made this person one of three? So sure, of course, without a reduction in force none of us would be here in this courtroom arguing this case. So that isn't -- the determining factor in why Dale Gehring was picked as one of the three is in your view his age and in defendant's view something else.

MR. FOX: That is true but. . . . Age has to be a factor that tips the scale. It has to be a but for factor. Even taking this reduction in force, they could say, Well, it was age plus the type of job he had. . . . If he was a younger man . . . in that particular job, he wouldn't have been the one selected;. . . .

* * *

[R. 91:71, Lines 16-25 (Tr. 3-B-71); R. 91:72, Lines 1-9, 12-15, 17-19 (Tr. 3-B-72)]

GEHRING OPENING

* * *

How do you prove a case of age discrimination? We all recognize that there is a law that prohibits terminating somebody or somehow disadvantaging them in a place of employment because of their age. Because of the general awareness of that law, it is very difficult to prove cases by what we call direct evidence. The Judge in her opening

remarks referred to two types of evidence, circumstantial and direct evidence. In age discriminating [sic] cases you almost always find proof by indirect evidence. The indirect evidence that we have to offer. . . .

We also believe we have direct evidence in this case. . . .

* * *

[R. 86:3, Lines 17-25 (Tr. 1-A-3); R. 86:4, Lines 1, 7 (Tr. 1-A-4)]

GEHRING CLOSING

* * *

As I told you at the beginning of this case, there are two ways that I intended to prove this. One of the ways is by showing that Dale is over 40 years of age and in this case at the time he was terminated from his employment he was 52. That he was qualified for a job for which he was terminated and he was qualified for other jobs that remained at Case in Wausau after he left. That he was, in fact, the person selected for termination and the reasons he was selected, the one that have [sic] been offered, have been incredible and untrue.

* * *

. . . Let's [also] look at the direct evidence finally in the end.

* * *

[R. 91:9, Lines 14-22 (Tr. 3-B-9); R. 91:23, Lines 1-2 (Tr. 3-B-23)]

INSTRUCTION CONFERENCE

(In Relation To Gehring Proposed *"St. Mary's"* Instruction; See This Appendix At 8)

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MR. SHINDELL: I guess we have two objections to that, Your Honor. One is that it suggests that there is evidence of discrimination but you need not draw the inference. Two is that it now places what the Court proposed of an imbalance, because the Court's question was evenly just. What is the bottom line question?

Now, we've beefed up the plaintiff's desired instruction, but we don't have a counterbalancing defendant burden instruction; and it's imbalanced now, or not in balance.

So we either have to start and stay with what the Court proposed. If they want to add theirs, then the defendant's entitled to one so that it puts -- and then you are back to basically the shift and instruction on the shifting burden of proof.

THE COURT: Yeah. I'm really tempted to stay with the simple one. You can certainly argue, just as you would anytime if somebody comes to you and says the reason I brought this sweater back to the store was because it

had a hole in it and it didn't fit me and it was the wrong color, but the real reason is they had already worn it six times and nobody said they liked it or something. You can always say: Look, those aren't the real reasons. That person said those reasons, but we know they're not the real ones. What do you think really happened up here in Wausau in June of 1991?

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[R. 88:144, Lines 5-25 (Tr. 3-A-144); R. 88:145, Lines 1-3 (Tr. 3-A-145)]